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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1975

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**No. 75-1667**

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UNITED STATES, *Petitioner*

v.

CHARLES J. PILUSO, ET AL., *Respondent*

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## BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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Now COMES the Respondent Charles J. Piluso and opposes the Petition for Writ of Certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

### OPINION BELOW

The opinion of the United States Court of Appeals is found at (Petitioner's App. 1a-5a) and is reported at 528 F.2d 247.

### JURISDICTION

Respondent adopts the jurisdictional statements set forth by the Petitioner.

## STATUTE INVOLVED

Section 7206(1) of the Internal Revenue Code of 1954, 26 U.S.C. 7206(1), provides:

Any person who—

> (1) * * * Willfully makes and subscribes any return, statement or other document, which contains or is verified by a written declaration that is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter * * *
>
> * * * * *
>
> shall be guilty of a felony and, upon conviction thereof, shall be fined not more than $5,000, or imprisoned not more than 3 years, or both, together with the costs of prosecution

## QUESTIONS PRESENTED

1. Does not the finding of fact of the United States Court of Appeals for the Fourth Circuit that the Respondent is entitled to a new trial because of the failure of the trial judge to instruct the jury in accordance with tendered instructions present a factual determination based on the entire record which is not reviewable in this Court under *National Labor Relations Board* v. *Pittsburg S & S Co.,* 340 U.S. 413 91 Sup. Ct. Rep. 453.

2. Whether, in the special factual situation presented by this record, the Court of Appeals was correct in holding that it was error for the trial judge to remove from the jury's consideration all questions with respect to the Respondent's "good motive" when the Respondent contended that good motive caused him to omit from his gross income and treat as non-taxable the "corporate advances" he had received.



## COUNTERSTATEMENT

Respondent incorporates the statement filed by the Petitioner with the following factual additions.

The Respondent was indicted and convicted of three counts which charged a violation of Title 26, Section 7206(1) U.S.C. The indictment charged that the Respondent had filed false tax returns in that he had fraudulently failed to include in his gross income certain funds that were received by him and which he well knew to be taxable. The indictment also charged that with respect to the year 1971 the return was false and fraudulent in that the Respondent claimed a $119,000 partnership loss on his personal tax return which the Government contended was not a valid partnership loss but a corporate loss.

Respondent, Charles J. Piluso, an attorney at law, joined the Pomponio organization in 1965.[1] In 1967 an audit of the Pomponio corporations and their officers by the Internal Revenue Service for the taxable years 1963 and 1964 terminated in a compromise. One of the issues which was disputed and resolved was the taxability or non-taxability of certain corporate advances that had been made during those years by Pomponio-controlled corporations to their corporate officers. The certified public accountant, Burton Bates, who represented the Pomponio inter-

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[1] The Pomponio organization consisted of over forty corporations which were owned by the Pomponio brothers, Louis, Jr., Peter and Paul.

• "Tr." refers to the transcript of trial proceedings. "R.A." refers to the combined appendix filed in the court of appeals on behalf of all the respondents; "R" refers to the appendix filed on behalf of respondent Piluso.

ests during the audit and who prepared the tax returns for the corporate officers, testified that as a result of the final compromise "the majority of the advances were not taxed as income, the same procedure followed". He testified that following the resolution of this audit the Pomponio corporations followed the same accounting procedure employed in the past with respect to corporate advances to its officers. This policy treated "corporate advances" as loans which were duly recorded as such on the books and records of each corporation that made the advance. Each corporate advance was also reflected by the setting up of an account receivable on the books and records of the corporation making the particular advance. (Tr. 395-396.)

During the subsequent Internal Revenue audit of the Pomponio corporations and their officers, leading up to the indictment in the present case, agents of the Internal Revenue Service discovered in 1971 that the Respondent, Charles J. Piluso, had not in fact signed his 1969, 1970 and 1971 tax returns when they were filed. The agents then presented the tax returns to the Respondent for his signature. His 1969 tax return was signed and subscribed to on March 11, 1971; the 1970 tax return was signed and subscribed to on August 1, 1971; the 1971 tax return was signed and subscribed to on November 10, 1972. At the time Respondent signed these tax returns he was aware of the full-scale audit that was being conducted by the Internal Revenue Service. He was also fully aware that in 1967 the Internal Revenue Service had largely accepted, without penalties, the contention of the Pomponios that the corporate advances were in fact loans to the officers and not taxable income to them.



Bates testified further that as a matter of practice each calendar year he would supply the Respondent with all the necessary financial data for Respondent's accountant to prepare his income tax return. He testified that he never supplied the Respondent with the amount of the corporate advances made in any given year because they were treated as loans to the corporate officers and not as income to them. (Tr. 422.)

Respondent tendered a number of instructions to the trial judge in accordance with his defense that in good faith, to wit that motivated by the Internal Revenue's prior position in the 1967 compromise, he did not include the corporate advances in his gross income for the years in question. These instructions, 2, A, B, C, D, X and Y (Res. App., pp. 2a-6a) were tendered and denied. These instructions placed before the jury in varying ways the legal proposition that Respondent was entitled to an acquittal even if the jury believed the corporate advances for the years in question were in fact income to the Respondent unless they were also satisfied beyond a reasonable doubt that the Respondent did not truly believe the corporate advances were in fact loans to him when he affixed his signature to the tax returns in question. These instructions were denied by the trial judge over the Respondent's objection.

The Court of Appeals reversed the conviction and awarded the Respondent a new trial. It held, inter alia, that the trial judge committed prejudicial error when he failed to instruct the jury in accordance with the substance of instructions tendered by the Respondent relating to his defense of good faith.

The Court of Appeals' opinion also reversed the conviction because of the trial judge's instruction to the jury that they should remove entirely from their consideration the existence of the Respondent's alleged good motive in omitting the corporate advances from his gross income when the jury sought to determine whether the requisite willfulness existed when the returns were signed. This separate basis for reversal has been treated by the Petitioner as Point 1 in its Petition for Certiorari (Pet. for Cert., pp. 8-12). Respondent suggests that it will be unnecessary for the Court to reach and/or decide the correctness of this contention because of the independently-based ground for reversal with respect to the denial of the substance of tendered instructions by the Respondent. Respondent has, therefore, replied to this contention as Point 2 in this brief in opposition to the Petition for Certiorari since the opinion of the Court of Appeals makes resolution of this issue unnecessary.

**REASONS FOR DENYING THE WRIT**

The Court of Appeals' opinion, which awarded the Respondent a new trial, is independently based on the finding and conclusion of the Court of Appeals that the jury was not properly instructed in accordance with the substance of tendered instructions, which is a non-reviewable issue in this Court.

The Petitioner concedes that the reversal of the conviction by the United States Court of Appeals is independently based on the finding and conclusion of the Court of Appeals from the entire record that the jury was not properly instructed in accordance with the substance of tendered instructions. At page 12 of the Petition for Certiorari the Petitioner states:



> "Although this issue would not independently warrant review by this Court, this aspect of the trial judge's instruction was an independent ground for reversal by the Court of Appeals."

This concession by the Petitioner is supported by this Court's ruling in *National Labor Relations Board* v. *Pittsburg S & S Co., supra.* This Court, under the doctrine in *National Labor Relations Board* v. *Pittsburg S & S Co., supra,* would accept and defer to a finding of fact made by the Court of Appeals based on their conclusions drawn from the entire record. Since this non-reviewable issue separately requires a new trial for the Respondent, Petitioner's asserted error in Point 1 of its Petition, pp. 8-12, dealing with the Court of Appeals' additional separate basis for reversal (because of the removal of good motive from the jury's consideration), need not be reached or resolved by this Court. This Court has often stated that it will not decide contingent or abstract questions in advance of necessiy for its decision. *Thorpe* v. *Housing Authority of the City of Durham,* 393 U.S. 268 89 S.Ct. 518.

Respondent's instructions 2, A, B, C, D, X and Y (Res. App., pp. 2a-6a) were all refused by the trial judge. They were not granted in substance. They sought to place before the jury, in accordance with Respondent's defense, the legal proposition that if Respondent in good faith believed the corporate advances received by him were loans and thus did not include them in his gross income the jury should acquit. They also conveyed to the jury that they should acquit Respondent even if they were satisfied beyond a reasonable doubt that the corporate advances were not

loans but were in fact income if and unless they were satisfied beyond a reasonable doubt that Respondent did not in good faith believe they were loans when he signed the tax returns.

The factual determination and conclusion by the United States Court of Appeals that the trial judge did not in fact substantively charge the jury in accordance with the instructions tendered by the Respondent necessarily involves a consideration of the entire evidentiary record, an evaluation of the instructions tendered and the entire charge of the Court. Th Court of Appeals has resolved this issue in the Respondent's favor in awarding him a new trial. This issue is not reviewable in this Court even if this Court, upon a review of the entire record, were to reach a different conclusion as to whether the trial judge had adequately charged the jury in accordance with Respondent's theory of defense. As this Court stated in *National Labor Relations Board* v. *Pittsburg S & S Co., supra,*

> "*This is not the place to review a conflict of evidence nor to reverse a Court of Appeals because were we in its place we would find the record tilting one way rather than the other, though fair-minded judges could find it tilting either way.* It is not for us to invite review by this Court of decisions turning solely on evaluation of testimony where on a conscientious consideration of the entire record a Court of Appeals under the new dispensation finds the Board's order unsubstantiated. In such situations we should '*adhere to the usual rule of non-interference where conclusions of Circuit Courts of Appeals depend on appreciation of circumstances which admit of different interpretations.*' Federal Trade Comm'n.



> v. American Tobacco Co., 274 U.S. 543, 47 S.Ct. 663, 71 L.Ed. 1193."

This Court, in *Federal Trade Commission* v. *American Tobacco Co.,* 274 U.S. 543 47 S.Ct. 663, 71 L.Ed. 1193, stated:

> It now appears to us that this matter of fact is of no general importance. Accordingly, we adhere to the usual rule of noninterference where conclusions of Circuit Courts of Appeals depend on appreciation of circumstances which admit of different interpretations, and upon that ground alone we affirm the judgment below.

The language of Mr. Justice Frankfurter, dissenting in *Dick* v. *New York Life Insurance Co.,* 359 U.S. 451, 79 S.Ct. 921, is applicable, wherein he stated:

> In order to justify the establishment of the Circuit Courts of Appeals it was necessary to view certiorari as
>
> > 'a power which will be sparingly exercised, and only when the circumstances of the case satisfy us that the importance of the question involved, the necessity of avoiding conflict between two or more courts of appeal, or between courts of appeal and the courts of a State, or some matter affecting the interests of this nation in its internal or external relations demands such exercise.'
>
> *Forsyth* v. *City of Hammond,* 166 U.S. 506, 513, 17 S.Ct. 665, 668.

The Petitioner argues that the tendered instructions were in fact substantively given to the jury and cite in support of their argument certain excerpts from the Court's charge (Pet. for Cert. p. 13; Tr.

1123 and 1116-1117). *The Petitioner is precluded from making this argument in this Court because the Court of Appeals has reached an opposite conclusion based on the entire record, the tendered instructions and the entire charge of the Court.* See *National Labor Relations Board* v .*Pittsburg S & S Co., supra,* and *Federal Trade Commission* v. *American Tobacco Co., supra.* This argument also misconceives the substance conveyed in the tendered instructions and avoids the explicit statements of the trial judge throughout the record that he had no intention of instructing the jury in accordance with the tendered instructions. (Tr. 717 and 1084.) The Instruction A (Res. App., p. 3a) requested the Court to instruct the jury that they had to believe beyond a reasonable doubt that the Respondent did not believe in his own mind that the corporate advances were loans when he signed the tax returns before they could convict him. It also calld upon the Court to instruct the jury that in determining Respondent's state of mind on the issue of willfulness they could consider the Respondent's knowledge of the Internal Revenue Service's position adopted in earlier years as to the taxability or nontaxability of the corporate advances to the officers. It also set forth that the jury might consider the family control of the corporations in question, the repayment and/or the intention to repay, and the presence of a certified public accountant in connection with the preparation of personal and corporate returns in determining whether the requisite willfulness existed. None of these concepts was even remotely conveyed by the trial judge to the jury in those portions of the charge cited by the Petitioner (p. 13 Pet. for Cert.; Tr. 1116-1117, 1123). Those excerpts cited by



the Petitioner do not purport to cover these concepts and indeed in tax prosecutions the failure of the trial judge to instruct on the reliance issue when a certified public accountant prepared the tax returns has been held itself to be reversible error. See *United States* v. *Mitchell,* 495 F.2d 185 (4 Cir. 1974); *Bursten* v. *United States,* 395 F.2d 976 (5 Cir. 1968); and *Perez* v. *United States,* 297 F.2d 976 (5 Cir. 1961).

Instructions B and X (Res. App., pp. 3a-5a) conveyed to the jury that the Government was required to establish beyond a reasonable doubt two issues in connection with the instant prosecution: (1) that the corporate advances for the years in question were in fact taxable income to the Respondent, and (2) that the Respondent knew and believed that the said corporate advances were income to him and not loans at the time he signed the returns which were alleged to be false and fraudulent.

Instructions C, D and Y (Res. App., pp. 4a-6a) dealt with the partnership loss claimed on Respondent's 1971 tax return. These instructions all sought to have the Court instruct the jury that in order to convict the Government was required to prove that the partnership loss claimed in 1971 was not a partnership loss but was in fact a corporate loss. They provided further that the Government had to prove beyond a reasonable doubt that the Respondent knew that the $119,000 partnership loss was in fact a corporate loss when he took it as a partnership loss on his 1971 tax return. The three excerpts from the trial judge's charge (Tr. 1116-1117; pp. 13-14 Pet for Cert. relied upon by the Petitioner in covering this issue did not adequately convey the substance of these concepts to the jury.

The Court of Appeals, in making its finding that the jury was inadequately instructed in accordance with tendered instructions reasonably raised by the evidence, had before it the entire charge of the Court and had the benefit of the explicit statements of the trial judge throughout the record that he had no intention of instructing the jury on what the state of mind of the Respondent was as to whether the corporate advances were income or loans if the jury concluded that the corporate advances should have been included in the gross income of the Respondent.

The trial judge's statements on the record make it unmistakably clear that the trial judge had no intention of stating the substance of Respondent's instructions to the jury which Petitioner seeks to attribute to the excerpted paragraphs relied upon in the Petition for Certiorari.

Sample excerpts of the judge's statements on the record reflecting this are as follows:

(Tr. 717)

THE COURT: " * * * The sole question is whether or not these advances, taking into consideration the whole situation, were legitimate bona fide loans if that term is used * * *

MR. AHERN: Whether the defendants believed they were bona fide loans?

THE COURT: Not what they believed

At the conclusion of the charge the trial judge was again specifically requested to instruct the jury in accordance with Instructions X and Y or to convey in similar language that if Respondent believed in fact, though erroneously, that the corporate advances were loans at the time the returns were signed, the



jury should acquit the Respondent. (Tr. 1138; R. 126):

MR. AHERN: I am specifically requesting you to supplement your charge and tell the jury that if they do not find they were bona fide loans but they believe the defendants operated on the premise that they were loans that is enough to acquit the defendants on each charge.

THE COURT: I don't think that is the law. If it is the law they have devised the greatest method of withdrawing funds I ever heard of.

The Court of Appeals, after examining the entire record, has concluded that the jury was not adequately instructed in accordance with Respondent's tendered instructions relating to the alleged good faith belief of the Respondent that the corporate advances were loans at the time he signed the returns.

This Court, therefore, under *National Labor Relations Board* v. *Pittsburg S & S Co., supra,* would defer to the Court of Appeals' finding of fact on this issue and would not disturb it even if on balance, this Court, based on the whole record, would have resolved this determination the other way.

As additional support for the findings and conclusions of the Court of Appeals, the Court of Appeals had before it the entire charge of the trial judge which emasculated to the point of derision the central defense placed before the jury by the Respondent in his instructions, to wit: his good faith belief that the "corporate advances" were loans and thus not includible in his gross income. The total elimination of this defense from jury consideration was accomplished

not only by the tritl judge's denial of tendered instructions, supra, but by the manner in which the jury was instructed. The trial judge employed the following descriptive terms instructing the jury on Respondent's defense of good faith. The records of the Pomponio corporations were described as the "so-called bookkeeping records" (R. 98). When instructing the jury on corporate advances they were described as the "so-called advances" (Tr. 1114 R. 102). When charging the jury with respect to the claimed partnership loss on the 1971 tax return it was referred to as the "so-called loss" (Tr. 1114, R. 102). In dealing with the subject of repayment of the loans, the jury was instructed:

> "And the defendants further brought out and called to your attention the 'so-called repayments' in determining the partnership loss." (Tr. 1119, R. 107)

In describing the partnership loss (there was never any contention by the Government that the partnership was not a valid one) the judge again used the derisive adjective "so-called" when he stated (Tr. 1129; R. 116):

> "Now I told you during my comments above the 'so-called' partnership"

At the conclusion of the charge detailed objections were made to the Court's terminology, its treatment of the defense of good faith, and the denial of the Respondent's instructions. The trial judge did not hesitate to state on the record a total disbelief in the good faith defense of the Respondent. This is reflected



in the following references in the record.[2] The Court of Appeals, therefore, in making its finding that the jury was not properly instructed in accordance with Respondent's theory of defense, has an overwhelming record to support their finding which, under this Court's decision in *National Labor Relations Board* v. *Pittsburg S & S Co.,* is not reviewable in this Court.

The Petition for Writ of Certiorari should accordingly be denied.

The ruling of the United States Court of Appeals for the Fourth Circuit is not in conflict with either *United States* v. *Hawk,* 497 F.2d 365, (C.A. 9), cert. denied, 419 U.S. 838; *United States* v. *McCorkle,* 511 F.2d 482 (C.A. 7) (en banc), cert. denied 423 U.S. 826; and *United States* v. *Pohlman,* 522 F.2d 974 (C.A. 8), (en banc), cert. denied January 12, 1976, No. 75 — 483, and its ruling that good motive may not be removed from a jury's consideration in determining willfulness is in complete harmony with the cases from the Seventh, Eighth and Ninth Circuits and with this Court's ruling in *United States* v. *Bishop,* 412 U.S. 346 (1973).

In *United States* v. *Bishop,* 412 U.S. 346 (1973), which involved a prosecution under 26 USC 7206 (1), this Court determined that the word "willfully" comprises and requires proof of "a voluntary intentional

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[2] "If it is legal I am the first to congratulate these gentlemen for it." (Tr. 812).

"If you can do that by loan frankly I don't know why I was so stupid during the forty years I was practicing law." (Tr. 714).

"If that is permissible, it is great. We're going to have a revolution." (Tr. 724).

violation of a known legal duty" 412 U.S. at 360 and the "bad faith or evil motive" described in *United States* v. *Murdock,* 290 U.S. 389 (1933) 412 U.S. at 360.

The trial judge correctly defined willfulness to the jury (Tr. 1097; R. 85):

> "The Supreme Court has formulated the requirement of willfulness as used in this identical statute as bad faith or evil intent or evil motive and one of justification in view of all the financial circumstances * * * "

The Court later in the charge told the jury (Tr. 1124; R. 112):

> "Good motive alone is never a defense where the act done or omitted is a crime. So the motive of the accused is immaterial except insofar as the evidence of motive may aid determination of state of mind or intent."

Thus, after having initially told the jury the correct definition of willfulness as defined by this Court in *Bishop* v. *United States,* supra, which required the showing of an evil motive in a 7206(1) prosecution, involving the filing of false tax returns, they were inconsistently told that they should exclude from all consideration the Respondent's good motive *which caused him not to include the corporate advances as a part of his gross income when he signed the returns.*

In the instant case the prosecution under Title 26, Section 7206(1) imposed the duty on the Respondent to sign and subscribe under the penalties of perjury to a truthful tax return. Respondent contended that the prior decision of the Internal Revenue Service in 1967, which accepted the corporate advances as loans



rather than income to the corporate officers, plus the concurrence of the certified public accountant in the treatment of the corporate advances as loans to the officers, operated as the good and motivating reasons, *i.e. the good motive, which caused the Respondent to sign and subscribe to his 1969, 1970 and 1971 tax returns in the middle of a full-scale audit of the Pomponio corporations and their officers.* Therefore, the good motive in this case, which was the asserted belief by the Respondent Piluso that the corporate advances were loans and not includible in his gross income, was directly caused and brought about by the actions of the Internal Revenue Service. The evidence in this case presented a record where *the good motive asserted by Respondent had a direct probative relevance to why the corporate advances were not included as part of the Respondent's gross income,* which was an entirely proper subject for the jury to consider in determining whether the requisite willfulness existed under this Court's ruling in *United States* v. *Murdock,* 290 U.S. 389. The conflict in the Circuits, which the Petitioner seeks to urge in his Petition, does not in fact exist if the present record is scrutinized and the decisions cited by the Petitioner are analyzed on their facts.

*United States* v. *Hawk, supra,* Ninth Circuit; *United States* v. *McCorkle, supra,* Seventh Circuit; *United States* v. *Pohlman, supra,* Eighth Circuit, simply hold with dissents among the panels that it is not reversible error in a prosecution under Title 26 Section 7203 USC (Failure to File Tax Returns) for the trial judge to refuse to use the words "evil motive and bad purpose" *in defining willfulness so long as other appropriate language conveys the necessary mens rea*

*that conveys to the jury the wrongful or bad purpose.* In *United States* v. *Hawk, supra,* the Court of Appeals stated:

> Still a nagging question remains as to Justice Blackman's 'evil motive'; was it the unstated intent of the opinion to require inclusion of those exact words? We think not. The statement in the opinion is that willfulness is to be uniformly defined to require the bad purpose or evil motive described in Murdock v. United States, 290 US 389 (1933) * * * the term 'evil motive' is merely a 'convenient short hand expression to distinguish liability based on conscious wrongdoing from liability based on mere carelessness or mistake. Boardman v. United States, 419 F.2d 110 (First Circuit 1969) cert. denied 397 U.S. 991 (1970)

The cases cited by the Petitioner from the Seventh, Eighth and Ninth Circuits simply hold that in a 7603 prosecutions there *is no inflexible requirement for the trial judge to use in hae verba* the phrases "bad purpose" or "evil motive" when defining willfulness. None of these cases remotely suggests that in a 7206(1) prosecution the judge may exclude the good motive of the accused in signing the return *if the good motive has probative relevance to the breach of the known legal duty. United States* v. *Hawk, supra,* is not in conflict with the instant decision. *U.S.* v. *Hawk, supra,* simply holds, in dealing with a prosecution under Title 16, Section 7203 that this Court did not require and/or ascribe any particular "magic" to the words "bad purpose and evil motive" such that a trial judge, under pain of reversible error, must use those very terms when willfulness is defined to the jury.



The scope of all the decisions from the Ninth Circuit relied upon by the Petitioner was clearly defined in *United States* v. *Colacurcio* (9 Cir.), 514 F.2d 1 (1975). The Court of Appeals stated:

> "Contrary to appellant's position, this court and other courts have held that 'magin words' such as 'bad purpose' or 'evil motive' are not necessary as part of the willfulness instruction in cases of this nature. U.S. v. Hawk, 487, F.2d 365 and U.S. v. Divarco, 484, F.2d 670, 674 (Seventh Circuit 1973), cert. denied 415 U.S. 916 94 S.Ct. 1412."

*United States* v. *Pohlman,* 522 F.2d 974 (C.A. 8), is not in conflict with the instant decision. This case, with dissents among the panel, affirmed a conviction in which the majority ruled that the trial judge had not committed reversible error in instructing the jury on the requirements of willfulness in a prosecution under Title 26, Section 7203 USC. The majority opinion held that the trial judge had sufficiently conveyed to the jury the necessary mens rea or evil intent necessary to sustain a conviction for willfully failing to file a tax return even though the precise words "bad purpose and evil motive" were not used in defining willfulness. The dissenting members of that panel agreed with the majority ruling that this Court's decision in *United States* v. *Bishop, supra,* did not make it mandatory for the trial judge, under pain of reversible error, to use the precise words "bad purpose" or "evil motive" in defining willfulness as long as the concept of the necessary evil mens rea was adequately conveyed to the jury. In a footnote the dissenters did express their concern as to why the majority strained so hard to avoid the very words

that this Court employed in *Murdock* v. *United States,* supra, and *Bishop* v. *United States.*[3]

*United States* v. *McCorkle,* 511 F.2d 482 (7 Cir.), cert. denied 423 U.S. 826, cited by the Petitioner as in conflict with the instant decision is another prosecution under Section 7203 of Title 26. The Seventh Circuit in that case merely followed the Ninth Circuit in holding that it was not mandatory for a trial judge to use the precise terms "bad purpose" and "evil motive when defining willfulness to the jury.

*None of these cases remotely suggests that if an accused's good motive in signing a tax return, which eliminated from his gross income certain items alleged to be taxable, had a probative relevance to the duty allegedly breached,* the jury should be told to exclude it from their determination of whether the requisite willfulness exists, as the trial judge did in the instant case.

The Court of Appeals below recognized that in ordinary criminal cases generally the good motive of the accused would be irrelevant except insofar as it had a bearing on intent. The Court of Appeals stated (Pet. Ap. 4A and 5A):

> "Although the instruction was given to explain the difference between intent and motive, and would have been correct in most criminal trials, the Supreme Court indicated in Bishop that the statute at hand requires a finding of a bad purpose or evil motive."

[3] "We fail to understand why the language of the majority opinion strains so hard to avoid use of the very language the Supreme Court approved in Murdock and Bishop. 'Bad purpose and evil motive' to disobey the law is clearly an element of the offense and are words easily phrased and understood."



The Court of Appeals did not hold, as the Petitioner seeks to urge in this Court, that the alleged good motive was a complete defense to the charges. It simply held that in the circumstances of this case the trial judge was in error in telling the jury that in determining whether there was the requisite bad purpose or evil motive necessary to constitute willfulness when the Respondent signed the tax returns they should exclude from all consideration the good motive of the Respondent.

The Court of Appeals correctly pointed out that good motive would ordinarily be irrelevant in most criminal cases. It could be argued that it would be irrelevant even in those tax prosecutions where the known legal duty is simply the duty to file a tax return, as was the case in all the 7603 prosecutions cited by the Petitioner, *United States* v. *Hawk, supra, United States* v. *Pohlman, supra, United States* v. *McCorkle supra.* The Court of Appeals for the Seventh Circuit in *Cullen* v. *United States,* 454 F.2d 386 (1971), after setting out the general rule holding that good motive is irrelevant in most criminal cases,[4] stated:

> "In some situations the defendant's ultimate objective may be an element of the particular offense charged. Thus to prove treason a purpose to give aid and comfort to the enemy must be established, to prove a criminal attempt an analysis of the defendant's purpose beyond the

[4] "His theory is merely another variety of an age-old argument. If a religious, moral or political purpose may exculpate illegal behavior, one might commit bigamy to avoid eternal damnation, steal from the rich to give alms to the poor, burn and destroy, not merely public records but perhaps buildings but even public servants as well to implement a Utopian design. * * * "

> overt act usually completed is necessary and to establish some forms of malice the reasons why the defendant acted as he did may be critical. In such cases the prosecution has the burden of proving improper motive and it would therefore be entirely proper for the defendant to respond with evidence of good motive * * * "

If the good motive contended for has no probative relevance to the known legal duty allegedly breached it should be excluded. Therefore, the Court was correct in excluding good motive in those cases cited in the Petiiton for Certiorari, pp. 11-12, where in 7203 prosecutions one's belief in the immorality of war was excluded, *United States* v. *Malinowski,* 472 F.2d 855 (C.A. 3); and/or one's good motive in protesting the withholding of income taxes from the wages of workmen, *United States* v. *Smith,* 487 F.2d 329 (C.A. 9); and/or one's desire to avoid disclosure of his identity to others, *United States* v. *Matosky,* 421 F.2d 410 (C.A. 7).

The Petitioner has recognized the relevancy of evil motive to prosecutions under 7201, 7206 and 7207 of Title 26 USC in the past. The Government has contrasted the necessity of evil motive under those sections with prosecutions under Section 7203 of Title 26 USC. In the Government's brief filed in the United States Court of Appeals for the Ninth Circuit in *United States* v. *Hawk, supra,* which was decided subsequent to this Court's decision in *United States* v. *Bishop, supra,* the Government contrasted prosecutions under Section 7203 with prosecutions under 7201, 7206(1) and 7207, and with reference to evil motive stated at page 14 of Government's brief:



> "Section 7203 involves willfulness only in conduct of omission and the 'bad' purpose necessary to the offense is simply a purpose 'to evade the law's requirements * * *.' The tax crimes of commission, be they felony or misdemeanor, sections 7201, 7206(1) and 7207, *which require affirmative acts of fraud or attempted evasion of payment of taxes, certainly involved evil motive as a part of such elements* but such term can only mislead the jury in a failure to file a misdemeanor case where bad purpose adequately covers the purposeful failure to do what one knows the law requires one to do."

The 7203 prosecutions cited by the Petitioner do not conflict with the instant decision as set forth above.

## CONCLUSION

For the reasons stated above the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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*Charles Piluso*

# RESPONDENTS APPENDIX

COUNT 11

THE GRAND JURY FURTHER CHARGES:

That on or about the 11th day of March, 1971, in the Eastern District of Virginia, CHARLES J. PILUSO, a resident of McLean, Virginia, did willfully and knowingly make and subscribe a United States Individual Tax Return, Form 1040, for the calendar year of 1969, which was verified by a written declaration that it was made under the penalties of perjury and was filed with the Internal Revenue Service, which said income tax return he did not believe to be true and correct as to every material matter in that the said return reported income from wages in the amount of $26,000, dividends in the amount of $1,314.59, interest in the amount of $2,622.92, and fees of $4,700 whereas as he then and there well knew and believed, he received substantial income in addition to that heretofore stated.

Violation of Section 7206(1), Internal Revenue Code, Title 26, United States Code, Section 7206(1).

COUNT 12

THE GRAND JURY FURTHER CHARGES:

That on or about the 1st day of August, 1971, in the Eastern District of Virginia, CHARLES J. PILUSO, a resident of Arlington, Virginia, did willfully and knowingly make and subscribe a United States Individual Income Tax Return, Form 1040, for the calendar year 1970, which was verified by a written declaration that it was made under the penalties of perjury and was filed with the Internal Revenue Service, which said income tax return he did not believe to be true and correct as to every material matter in that the said return reported income from wages in the amount of $39,850.10, dividends in the amount of $1,570.80, interest in the amount of $1,200.09, legal fees

in the amount of $7,000 and losses from partnerships in the amount of $48,756, whereas, as he then and there well knew and believed, he received substantial income in addition to that heretofore stated.

Violation of Section 7206(1), Internal Revenue Code, Title 26, United States Code, Section 7206(1).

COUNT 13

THE GRAND JURY FURTHER CHARGES:

That on or about the 10th day of November, 1972, in the Eastern District of Virginia, CHARLES J. PILUSO, a resident of Arlington, Virginia, did willfully and knowingly make and subscribe a United States Individual Income Tax Return, Form 1040, for the calendar year 1971, which was verified by a written declaration that it was made under the penalties of perjury and was filed with the Internal Revenue Service, which said income tax return he did not believe to be true and correct as to every material matter in that the said return reported income from wages in the amount of $50,006.69, dividends in the amount of $1,531.60, interest in the amount of $846.51, gain from sale of capital assets in the amount of $480.65, legal fees in the amount of $6,300 and partnership losses in the amount of $200,580.60, whereas, as he then and there well knew and believed, he received substantial income in addition to that heretofore stated and had less partnership loss than heretofore stated.

Violation of Section 7206(1), Internal Revenue Code, Title 26, United States Code, Section 7206(1).

INSTRUCTION NO. 2

The issue in this case is whether the defendants willfully and knowingly made and subscribed Federal income tax returns for the years 1969, 1970 and 1971, which, at



the time the returns were made and filed, they did not believe to be true and correct as to every material matter in the said returns.

If the defendants believed that the returns were true and correct, and made in good faith, they did not violate the law. The evidence must establish beyond a reasonable doubt that the defendants knowingly and willfully, with an evil motive, filed these returns knowing that they were not true and correct as to every material matter.

26 U.S.C. Section 7206(1) Tendered by Defendants

INSTRUCTION A

The jury is instructed that even if you believe beyond a reasonable doubt that the sums advanced by the corporations should be treated as income rather than advances or loans, as contended for by the defendant, before you could convict the defendant you would have to believe beyond a reasonable doubt that he did not reasonably believe in his own mind that the advances were loans, but were income.

In that connection you are instructed that you may consider the defendant's knowledge or lack of knowledge of the Internal Revenue Service's prior position on the question of advances constituting income or loans, the family control of the corporations, the repayment and/or intention to repay, the presence of a C.P.A. and any other factors bearing on what the defendant's state of mind was when he subscribed to the returns in question.

INSTRUCTION B

The jury is instructed that the defendant contends that in good faith he subscribed his name to each return for the years 1969, 1970 and 1971.

The jury is further instructed that before you could convict the defendant on any of the three charges you

would have to believe beyond a reasonable doubt not only that the sums received by the defendant as advances from the corporations was income, rather than loans or advances, but you would further have to find and believe that the government had established beyond a reasonable doubt that the defendant knew and believed that said advances were income and not loans when he affixed his signature to such return.

If the government failed to establish each of these two elements beyond a reasonable doubt, then it would be your duty to find the defendant not guilty, and if you have a reasonable doubt about this you must give the benefit of the doubt to the defendant and find him not guilty.

INSTRUCTION C

You are instructed that with respect to the calendar year 1971, the government contends that the defendant Piluso took a partnership loss when in fact the loss was that of The Virginia Corporation.

You are instructed that, if the government fails to prove beyond a reasonable doubt that The Virginia Corporation was entitled to the loss, you should go no further and find the defendant not guilty on that count.

If you do find that the government has proved beyond a reasonable doubt that The Virginia Corporation was entitled to the loss, before you could convict the defendant the government must establish beyond a reasonable doubt that the defendant did not have reasonable reason to believe that the partnership was entitled to the loss.

INSTRUCTION D

With respect to the year 1971, the defendant's tax return is in evidence. The return shows that without taking the PHB Associates partnership loss, the defendant's tax liability would not have been affected. You may consider this in determining whether, when the defendant signed the return, he did so with evil motive.



INSTRUCTION X

The jury is instructed that the Government contends that for the years 1969, 1970 and 1971 the defendant Charles Piluso received substantial advances which they contend constituted taxable income.

The defendant Piluso contends that said advances were loans or advances which he intended to repay and which were carried on the books of the corporation as advances or loans.

You are instructed that the Government has a two-fold burden with respect to the proof on each count of the indictment. In that connection, you are instructed that the Government must establish beyond a reasonable doubt not only that the advances admittedly received by the defendant were not loans or advances as contended for by the defendant, but the Government must prove beyond a reasonable doubt that when he subscribed his name to the tax return for each year involved that the defendant Piluso did not in truth and fact believe that these monies were in fact advances or loans, but that on the contrary, he believed they constituted taxable income and subscribed to the return willfully as this court has defined that term to you. If the Government does not establish each of these two elements beyond a reasonable doubt then it would be your duty to find him not guilty, and if you have a reasonable doubt about this, then you must give the benefit of that doubt to the defendant and find him not guilty.

INSTRUCTION Y

The jury is instructed that as to the year 1971 the Government contends that the defendant claimed a partnership

loss in PHB Associates when in fact he was not entitled to said loss.

You are instructed that the burden is on the Government to establish beyond a reasonable doubt not only that the loss was not a properly allowable loss to the partnership, they must establish beyond a reasonable doubt that when the defendant subscribed to the return he did not honestly believe that the partnership was entitled to the loss.

If you find the Government has not satisfied you beyond a reasonable doubt that the Virginia Corporation was entitled to the loss you need go no further and it would be your duty to resolve the partnership loss taken by the defendant in his favor. On the other hand, if you are satisfied beyond a reasonable doubt that the Government has established that the Virginia Corporation was entitled to the loss, and not the partnership (PHB), then before you could convict the defendant, you would have to go still further and you would have to believe beyond a reasonable doubt that when he subscribed his name to the tax return for the year 1971 he did so willfully with bad purpose, knowing that the partnership loss so claimed could not reasonably be taken on his return, and that he did so with bad motive and total absence of justification or belief in the manner in which he treated the partnership loss on his return.